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# Introduction to Symposium on Economic Torts

Dana R. Howard  
*University of Kentucky*

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## P R E F A C E

### Introduction to Symposium on Economic Torts

The summer after my second year of law school introduced me to the dynamic topic of Economic Torts. While clerking at a large law firm, the attorney to whom I was assigned presented me with the following situation: Our client, P, purchased Widget Co. from D. Now, five years later, D has started Widget II Co. and is directly soliciting P's customers (D's former customers). P wants to bring an action against D to enjoin him from any further solicitation.

Armed with a legal arsenal consisting of a fleeting knowledge of first year torts and contract law and only a slightly more recent recollection of business associations and intellectual property, a host of (what I hoped to be insightful) questions came to mind. Did D enter into a non-compete agreement with P? Was D currently working for P, such that D may have obtained knowledge of P's trade secrets or owe a fiduciary duty to P? As quickly as the questions came, so did the answers. The non-compete agreement had already expired, and D never worked for P. Although no potential claims came to mind, the attorney was certain that he had read a case somewhere that involved a cause of action applicable to our situation. He was right. After further research, I found the cause of action—misappropriation of goodwill. The research, however, only raised more questions. If P could have contracted for a more extensive non-compete agreement, what purpose(s) did a tort action for misappropriation of goodwill serve? Is there some other interest, other than P's private right to contract, that is worthy of protection in this situation? Does the action protect P's economic interest or P's relationship with his customers? And, perhaps more importantly for me as a student, where in my law school's curriculum would I study these types of torts?

As Professor Feinman illustrates in his article, *Teaching Economic Torts*, similar questions about the classification, purpose, and scope of economic torts have plagued the field for years. Recently, though, anticipation regarding the upcoming release of the American Law Institutes' *Restatement (Third) of Economic Torts* has brought more attention to this highly charged topic. Responding in kind, the Symposium edition of the Kentucky Law Journal aims to add to the robust discussion on economic torts that was

begun at the Economic Torts Symposium held at the University of Arizona in Tucson on March 3-4, 2006, and to provide a context for a more in-depth analysis of the topic once the Restatement project is released.

To begin, Professor Jay Feinman proposes a business-focused, theory-based approach to teaching economic torts in the law school curriculum, a course which has been notably absent from many law school curriculums including that of the University of Kentucky. In addition to emphasizing a problem-based pedagogical approach that mirrors the way in which lawyers in a civil litigation practice learn the law, Professor Feinman develops a carefully considered sequence of topics to be covered. In doing so, he highlights the tensions inherent in any attempt to define and classify economic torts, i.e., those tensions between contract and tort law, between fiduciary and contract law, between statutory and common law, and between private and market transactions. Accordingly, the first part of his proposed course begins with a study of those causes of action, other than breach of contract, that arise from contractual relationships while the second part explores market-regulating doctrines which, for the most part, are statutory. Interestingly, each of the student-written notes in this issue addresses an economic tort that would be covered in Professor Feinman's course sequence. When read together, the student contributions also reveal other themes which emerge from the proposed organization of Professor Feinman's course. One reoccurring theme, in particular, concerns distinguishing instances where economic tort actions merely supplement contract actions from those situations where economic tort actions exist independent of contract actions to protect sufficiently important social interests. Another theme involves a jurisprudential trend of allowing increased recovery for economic injuries followed by efforts to restrain such recovery.

As evidenced by its placement as the first topic covered in Professor Feinman's proposed course, no discussion of economic torts could be properly conducted without an analysis of the economic loss doctrine. The doctrine exemplifies the tension between contract and tort law and provides the boundary by which tort principles may not creep into contract actions. In this issue, two notes cover this important topic. MacKenzie Mays Walter presents a national perspective on this doctrine. In her note, *The Solution to the Economic Loss Doctrine Confusion: The Disappointed Expectations Test*, Walter describes the three most common articulations of the rule and argues for a more consistently defined application of the most conservative version of the rule. By contrast, Matt Pujol's note, *The Economic Loss Rule and Missed Opportunities: How to Keep Kentucky from Drowning in a Sea of Tort* explains the local relevance (or lack thereof) of the economic loss doctrine in Kentucky and criticizes the Kentucky Supreme Court for its failure to clarify the extent to which the rule operates in Kentucky courts to prevent recovery of economic losses in common law tort actions.

Similarly, Kelly Rosenbaum addresses her note, *Mucking out the Stalls: How KRS 230.357 Promises to Change Custom and Facilitate Economic Efficiency in the Horse Industry* to the effects of local law on an industry vital to Kentucky's economy, the horse business. In particular, Rosenbaum details the most recent efforts of the Kentucky legislature to combat problems associated with dual agency in the horse trade industry and compares those legislative efforts to preexisting common law misrepresentation and agency principles. The note contributes to the discussion of economic torts in two important ways. First, it illuminates the reoccurring themes present in Professor Feinman's approach to economic torts, in particular, the tension between contract and fiduciary law. If buyers and sellers could contract with their agents not to act on anyone else's behalf, what purpose does a suit for breach of fiduciary duty serve? Is its purpose, as Professor Feinman explains, to fill gaps in the contract by imagining the way in which the parties would have resolved the issue? Or, as Professor Feinman alternatively suggests, is the breach of fiduciary duty suit necessary to protect societal standards of responsibility external to the contract? Second, the note reveals the existing confusion over the scope of economic torts at the state level. Rosenbaum suggests that preexisting common law misrepresentation and agency principles were sufficient to handle the problems associated with dual agency and that the Kentucky legislature has not identified any new interest worthy of additional protection.

A fourth note contained in this issue touches on a mixture of topics from both the first and second parts of Professor Feinman's proposed course of study. In *"Deep" Impact: Can a Tort Theory of Deepening Insolvency Survive in the "Options Backdating" Era?* Phillip Lewis offers a detailed account of a novel tort claim, deepening insolvency. Lewis traces the claim from its initial recognition in 2001 by a United States District Court in the Third Circuit to its likely demise by a 2006 Delaware state court decision. The analysis of the deepening insolvency claim and its potential effects on the American economy raises several interesting questions and concerns. Although Lewis concludes that the availability of a breach of fiduciary duty claim by creditors of insolvent corporations precludes the need for a deepening insolvency cause of action, readers may question whether such a claim should exist as supplementary protection for the integrity of market transactions. Further if an interest in the integrity of market transactions is presently endangered by the conduct giving rise to deepening insolvency claims, should the vehicle for protection be a product of legislative or judicial efforts?

As Lewis indicates, another interesting aspect of the deepening insolvency claim involves the context in which it developed. Deepening insolvency causes of action arose in the midst of reform and scandal. At the same time that the tort reform movement attempted to limit the recovery available for personal injury claims, several big corporate accounting scan-

dals, like Enron, became household names. Readers may question whether the recognition of the deepening insolvency claim was a judicial response to the highly publicized corporate scandals and the recent retreat a result of the passage of time since those scandals warranted national attention.

This trend of allowing increased recovery followed by efforts to restrain that recovery is also apparent in the English evolution of economic torts. In Professor Hazel Carty's article, *The Economic Torts and English Law: An Uncertain Future*, she reveals two distinct classes of economic torts—the misrepresentation torts and the general economic torts. The sparse number of general economic torts that is recognized by English law as compared to American law demonstrates the historical reluctance by the English judiciary to involve itself in matters that implicate the national economy. As Professor Carty explains, the primary expansion of general economic torts occurred during a time when the emergence of trade unions generated judicial hostility. Professor Carty argues that this hostility clouded the proper development of these torts and predicts that future decisions by the House of Lords will more appropriately limit the use of these types of actions to recover for pure economic losses.

As more law schools, including the University of Kentucky, begin to add economic torts to its course selection and as tort scholars and practitioners brace for the release of the *Restatement (Third) of Economic Torts*, the need for a continuing dialogue about this topic becomes more apparent. The Kentucky Law Journal hopes that the articles and notes in this issue both contribute to this discussion and help to cultivate further interest in and knowledge about this evolving field.

*Dana R. Howard*  
*Symposium Editor*